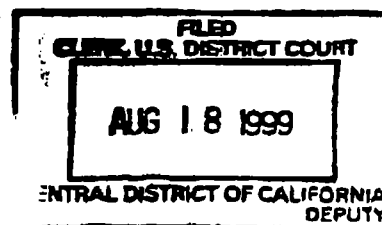


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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA;  
12 STATE OF CALIFORNIA, ex rel.,  
13 DEPARTMENT OF FISH AND GAME,  
14 STATE LANDS COMMISSION, and  
15 DEPARTMENT OF PARKS AND RECREATION, )

14 Plaintiffs, )

15 V. )

16 MONTROSE CHEMICAL CORPORATION OF )  
17 CALIFORNIA; RHONE-POULENC )  
18 BASIC CHEMICALS COMPANY; )  
19 ATKEMIX THIRTY-SEVEN, INC.; )  
20 STAUFFER MANAGEMENT COMPANY; )  
21 ICI AMERICAN HOLDINGS, INC.; )  
22 CHRIS-CRAFT INDUSTRIES, INC.; )  
23 WESTINGHOUSE ELECTRIC CORPORATION; )  
24 POTLATCH CORPORATION; )  
25 SIMPSON PAPER COMPANY; and )  
26 COUNTY SANITATION DISTRICT NO. 2 )  
27 OF LOS ANGELES, )

23 Defendants. )

24 AND RELATED THIRD PARTY ACTIONS. )

CASE NO. CV 90-3122 AAH

REPORT AND RECOMMENDATION  
OF THE SPECIAL MASTER RE:  
MOTION FOR ENTRY OF THE  
(1) AMENDED CONSENT  
DECREE WITH THE SETTLING  
LOCAL GOVERNMENTAL  
ENTITIES;  
(2) AMENDMENT TO THE  
MAY 19, 1992 CONSENT  
DECREE WITH POTLATCH  
CORPORATION AND SIMPSON  
PAPER COMPANY; AND  
(3) CONSENT DECREE WITH  
CBS CORPORATION

26 REPORT OF THE SPECIAL MASTER

27 Now pending before this Court is the motion of the  
28

1 plaintiffs, the United States of America ("United States") and  
2 the State of California ("State") (collectively "Plaintiffs") for  
3 Entry of the (1) Amended Consent Decree with the Settling Local  
4 Governmental Entities, (2) Amendment to the May 19, 1992 Consent  
5 Decree with Potlatch Corporation and Simpson Paper Company, and  
6 (3) Consent Decree with CBS Corporation.<sup>1/</sup> The Amended Consent  
7 Decree with the Settling Local Governmental Entities amends the  
8 Consent Decree that had been approved by this Court but was  
9 remanded by the United States Court of Appeals for the Ninth  
10 Circuit.<sup>2/</sup> The Amendment to the May 19, 1992 Consent Decree  
11 with Potlatch Corporation and Simpson Paper Company amends the  
12 previously approved Consent Decree entered into between the  
13 parties. Following entry of these consent decrees, the DDT  
14 Defendants will be the parties that remain in this case.<sup>3/</sup> For  
15 the reasons stated below, the Special Master recommends that the  
16 motions be granted and that the Court approve the three proposed  
17 consent decrees and cause the proposed Amended Consent Decree

18  
19 1. The State of California and the United States also  
20 move for entry of the three Consent Decrees as counter-  
21 defendants. County Sanitation District No. 2 of Los Angeles  
22 County also moves for entry of the Amended Consent Decree With  
23 the Settling Local Governmental Entities. CBS Corporation also  
24 moves for entry of the Consent Decree with CBS Corporation.

25 2. See United States v. Montrose Chemical Corp., 50 F.3d  
26 741 (9<sup>th</sup> Cir. 1995).

27 3. The "DDT Defendants" are Montrose Chemical Corporation  
28 of California, Atkemix Thirty-Seven, Inc., Rhone-Poulenc AG  
Company, Inc. (formerly Rhone-Poulenc Basic Chemicals Co.),  
Stauffer Management Company, Inc., Zeneca Holdings, Inc.  
(formerly ICI American Holdings, Inc.), and Chris-Craft  
Industries, Inc.

1  
2 With the Settling Local Governmental Entities, the Amendment to  
3 the May 19, 1992 Consent Decree with Potlatch Corporation and  
4 Simpson Paper Company, and the Consent Decree with CBS  
5 Corporation to be entered herein.

6  
7 I. Basis for Recommendation by the Special Master

8 The Special Master was appointed to preside over all  
9 pretrial matters, and specifically directed to meet and confer  
10 with counsel for all of the parties regarding settlement no later  
11 than July 29, 1992. See Pretrial Order No. 1 and Reference to  
12 Special Master to Supervise and Superintend Discovery and All  
13 Pretrial Matters ("Pretrial Order No. 1"), entered on March 18,  
14 1991. Pretrial Order No. 1 also authorizes the Special Master to  
15 submit recommendations to the Court on all pretrial matters that  
16 are not dispositive of an issue on the merits. Pretrial Order  
17 No. 1 at page 9. The three proposed Amended Consent Decrees are  
18 such matters.

19 Since 1991, the Special Master has conducted  
20 proceedings on a dual track, one of settlement and the other of  
21 supervising discovery and other pretrial matters. Pursuant to  
22 the Court's Pretrial Order No. 1, the Special Master has given  
23 priority to conducting settlement negotiations with the parties.  
24 Pursuant to the directives contained in Pretrial Order No. 1 and  
25 the supplemental oral guidance provided by the Court at the March  
26 18, 1991, and May 6, 1991 hearings, settlement discussions have

1  
2 been conducted under the Special Master's direct and personal  
3 supervision with all defendants in this case.

4 As set out in the Special Master's May 7, 1992  
5 Recommendation of the Special Master Regarding Entry of the  
6 Proposed Consent Decree Entered into Between Plaintiffs United  
7 States of America and State of California and Defendants Potlatch  
8 Corporation and Simpson Paper Company ("1992 Recommendation"), and  
9 the April 21, 1993 Recommendation of the Special Master Regarding  
10 Entry of the Proposed Consent Decree Entered into between  
11 Plaintiffs United States of America and State of California and  
12 Defendant County Sanitation District No. 2 of Los Angeles County  
13 and Certain Third-Party Defendant Local Governmental Entities  
14 ("1993 Recommendation"), due to the complexity of issues and the  
15 number of parties involved, the Special Master divided the  
16 Defendants into four groups for settlement purposes. The four  
17 groups were aligned as follows:

- 18 1. Potlatch Corporation ("Potlatch") and Simpson Paper  
19 Company ("Simpson"), both of whom involved the use of  
20 PCBs.
- 21 2. CBS Corporation ("CBS"), formerly named Westinghouse  
22 Electric Corporation, who also involved the use of  
23 PCBs.
- 24 3. County Sanitation District No. 2 of Los Angeles County  
25 ("LACSD") and approximately 150 Cities, Counties,  
26 Municipalities and Sanitation Districts (collectively  
27 the "Settling Local Governmental Entities").  
28

1  
2 4. DDT Defendants, all of whom involved the use of DDT.  
3 Negotiations between the Plaintiffs and each of the four groups  
4 were, and have been, conducted separately. In accordance with  
5 court orders as well as the orders of the Special Master,  
6 discussions with each group have been kept confidential by the  
7 participants.

8 However, the Special Master required the Plaintiffs to  
9 confidentially present to him their opinion as to the allocation  
10 of liability and damages between the parties. In supervising the  
11 settlement negotiations, the Special Master has ensured that this  
12 single apportionment by Plaintiffs has been used and applied  
13 equally to all four groups of Defendants.

14 Under the terms of the Amended Consent Decree, the  
15 Settling Local Governmental Entities have agreed to pay a total  
16 of \$45.7 million in damages and response costs, which represents  
17 approximately 20% of Plaintiffs' estimated bottom-line settlement  
18 amount.

19 Under the terms of the Amendment to the May 19, 1992  
20 Consent Decree with Potlatch Corporation and Simpson Paper  
21 Company, the settling parties have agreed to pay a total of \$12  
22 million in damages and response costs, which represents  
23 approximately 5% of Plaintiffs' estimated bottom-line settlement  
24 amount.

25 Under the terms of the Consent Decree with CBS  
26 Corporation, the settling party has agreed to pay a total of \$9.5  
27 million in damages and response costs, which represents  
28

1  
2 approximately 4% of Plaintiffs' estimated bottom-line settlement  
3 amount.

4  
5 II. Applicable Standard for Approval of Consent Decrees

6 This Court set out the standards for approval of a  
7 consent decree under the Comprehensive Environmental Response,  
8 Compensation, and Liability Act of 1980, as amended ("CERCLA"),  
9 42 U.S.C. SS 9601, et seq., in its May 19, 1992 decision with  
10 respect to the settlement between Plaintiffs and Potlatch  
11 Corporation and Simpson Paper Company, United States v. Montrose  
12 Chemical of California, 793 F. Supp. 237, 240 (C.D. Cal. 1992)  
13 ("Montrose I"), and again in its April 26, 1993 decision with  
14 respect to the settlement between Plaintiffs and the Settling  
15 Local Governmental Entities. United States v. Montrose Chemical  
16 of California, 827 F. Supp. 1453, 1458 (C.D. Cal. 1993)  
17 ("Montrose II").

18 In both those decisions, this Court stated that before  
19 a consent decree can be approved under CERCLA, a court must be  
20 satisfied that the consent decree under review is "fair,  
21 reasonable, and consistent with the purposes of CERCLA." Id. see  
22 also, e.g., United States v. Cannons Engineering, 889 F.2d 79  
23 (1st Cir. 1990). Moreover, this Court indicated in both those  
24 decisions that in order to approve a consent decree under CERCLA,  
25 a court must determine that the Consent Decree is "the product of  
26 a procedurally fair process . . . [and] substantively fair to the  
27 various parties in light of a reasonable reading of the facts in  
28

1 this case." Montrose I, 793 F. Supp. at 240-41, and Montrose II,  
2 827 F. Supp. at 1458.

3 Although the Court of Appeals for the Ninth Circuit  
4 vacated this Court's approval of the 1993 Consent Decree, the  
5 Ninth Circuit agreed with this Court that the standard to be  
6 applied in evaluating the 1993 Consent Decree was "whether it is  
7 'reasonable, fair, and consistent with the purposes that CERCLA  
8 is intended to serve.'" Montrose, 50 F.3d at 747, quoting United  
9 States v. Cannons Engineering Corp., 899 F.2d 79, 85 (1st Cir.  
10 1990). The Ninth Circuit also agreed with this Court that  
11 "CERCLA's primary goal [is] encouraging early settlement." 50  
12 F.3d at 748; Montrose I, 793 F. Supp. at 240; Montrose II, 827 F.  
13 Supp. at 1458.

14 The Ninth Circuit, however, provided this Court with  
15 additional guidance regarding the scope of this Court's  
16 evaluation of a consent decree. The Ninth Circuit stated:

17 [i]n conducting that evaluation, the court, in addition  
18 to considering any other relevant factors, should  
19 determine the proportional relationship between the  
20 [amount] to be paid by the settling defendants and the  
21 governments' current estimate of total potential  
22 damages. The court should evaluate the fairness of  
23 that proportional relationship in light of the degree  
24 of liability attributed to the settling defendants . .  
25 . . Moreover, we believe that the nature of the  
26 liability of the various defendants is of considerable  
27  
28

1  
2 relevance . . . . Finally, the court should 'factor  
3 into the equation any reasonable discounts for  
4 litigation risks, time savings, and the like that may  
5 be justified.'

6 Id., 50 F.3d at 747 (citations omitted).

7  
8 III. These Consent Decrees Meet the Ninth Circuit's Standards

9 A. Fairness

10 The proposed Consent Decrees must be the product of  
11 both a procedurally fair process and substantively fair to the  
12 parties in light of a reasonable reading of the facts. Montrose,  
13 50 F.3d at 747.

14 1. Procedural Fairness

15 If a settlement is negotiated at arm's length by  
16 experienced counsel with adequate information to evaluate the  
17 strengths and weaknesses of their case, the procedural fairness  
18 requirement is satisfied. Montrose II, 827 F. Supp. at 1458;  
19 Gannons, 899 F. 2d at 87. When considering the procedural  
20 fairness of the agreement, a court must look to the negotiation  
21 process and "attempt to gauge its candor, openness, and  
22 bargaining balance." Id. at 84.

23 Negotiations of all three of the proposed Consent  
24 Decrees occurred under the direct and personal supervision of the  
25 Special Master. The settlement negotiations in this case, which  
26 this Special Master has personally supervised, have been long,  
27 tedious and strongly litigated by the parties.



1  
2 The Special Master is thus personally aware of the  
3 compromises that were necessary in order to achieve agreement.  
4 In addition, the Special Master notes that in their opposition to  
5 the motions for entry, the DDT Defendants have not asserted that  
6 the process was procedurally unfair. Nevertheless, the Special  
7 Master is in a position both to comment on the integrity of the  
8 process and advise the Court regarding the merits of the proposed  
9 settlement.

10 a. Amended Consent Decree with the Settling  
11 Local Governmental Entities

12 The first of the three proposed settlements at issue  
13 involves the group consisting of Defendant LACSD and the third-  
14 party defendant local governmental entities alleged by the non-  
15 settling defendants to have owned or used sanitation systems and  
16 storm water runoff systems that released wastewater to the ocean,  
17 or otherwise engaged in activities, such as mosquito abatement,  
18 which may have resulted in the discharge of hazardous substances  
19 such as DDT into the environment. These releases of hazardous  
20 substances allegedly were made into areas serving as habitat for  
21 some of the resources that Plaintiffs allege have been injured,  
22 and into the environment that Plaintiffs may remediate.

23 The negotiations between the Plaintiffs and the  
24 Settling Local Governmental Entities in 1991 and 1992 produced a  
25 consent decree that the Special Master recommended that the Court  
26  
27  
28

1 approve.<sup>4/</sup> See 1993 Recommendation. The Court approved the  
2 1993 Consent Decree. Montrose II, 827 F. Supp. 1433. On March  
3 21, 1995, the Ninth Circuit Court of Appeals vacated the Court's  
4 approval of the 1993 Consent Decree and remanded the matter to  
5 the Court to make further findings consistent with the  
6 instructions provided. Montrose, 50 F.3d 741.  
7

8 Subsequent to the March 21, 1995 decision of the Ninth  
9 Circuit Court of Appeals, the Plaintiffs and the Settling Local  
10 Governmental Entities began settlement negotiations anew. As  
11 with the settlement negotiations between the parties with respect  
12 to the 1993 Consent Decree, all meetings and negotiations of the  
13 Plaintiffs and the Settling Local Governmental Entities  
14 concerning the proposed Amended Consent Decree have been  
15 conducted under the direct and personal supervision of the  
16 Special Master. Consequently, just as with the earlier  
17 settlements in this case, the Special Master is personally aware  
18 of the compromises that were necessary to achieve agreement and  
19 is in a position both to comment on the integrity of the process  
20 and advise the Court regarding the merits of the proposed  
21 settlement.  
22  
23

24 4. As described in the 1993 Recommendation, Plaintiffs  
25 had previously negotiated a proposed consent decree with some of  
26 the Settling Local Governmental Entities. However, Plaintiffs  
27 subsequently withdrew that proposed consent decree at the request  
28 of LACSD to permit attempts to negotiate a settlement that would  
include a broader group of all of the Settling Local Governmental  
Entities, including those which had been brought into this  
litigation as third-party defendants.

1  
2 Although many of the issues between Plaintiffs and the  
3 Settling Local Governmental Entities had been resolved during the  
4 hard-fought, sometimes difficult, arms-length negotiations that  
5 preceded approval of the 1993 Consent Decree,<sup>5/</sup> negotiations  
6 concerning amendments to the 1993 Consent Decree spanned more  
7 than thirteen months and required numerous meetings and  
8 conference calls.

9 Negotiations between the parties to the proposed  
10 Amended Consent Decree focused on the Ninth Circuit's March 21,  
11 1995 decision, and how the parties might amend or modify the  
12 settlement reflected in the 1993 Consent Decree to address the  
13 issues identified by the Ninth Circuit in its 1995 opinion. In  
14 an effort to do so, the parties prepared and exchanged numerous  
15 drafts of the settlement agreement until such time as the parties  
16 were able to reach agreement on language that was mutually  
17 satisfactory to all those concerned. This language can be found  
18 in the "Introduction" to the proposed Amended Consent Decree,  
19 which expressly addresses the rationale underlying the proposed  
20 settlement.

21 During the negotiations the parties also discussed  
22 whether or not EPA was going to undertake an investigation of the  
23 contaminated sediment on the Palos Verdes shelf and, if EPA were  
24 to undertake such an investigation, what relationship, if any,

25  
26 5. A description of the arms-length nature of the  
27 negotiations between the Plaintiffs and the Settling Local  
28 Governmental Entities can be found in the Special Master's April  
21, 1993 Recommendation at p. 5-7.

1  
2 such action would have to the Trustees' claim for natural  
3 resource damages. To address the Settling Local Governmental  
4 Entities' concerns about their liability for natural resource  
5 damages and for response costs, and the relationship between the  
6 two as a result of EPA's investigation of the Palos Verdes shelf,  
7 the parties discussed the scope of EPA's covenant-not-to-sue and  
8 the terms of the reopener provisions. The parties also spent  
9 considerable time debating the language of the proposed Amended  
10 Consent Decree, including definitions of the various terms used  
11 in the proposed Amended Consent Decree, the language of EPA's  
12 covenant-not-to-sue, and the language of EPA's reservation of  
13 rights.

14 The parties also discussed information regarding the  
15 Trustees' current bottom-line estimate of the total natural  
16 resource damages, including the estimated cost of restoration  
17 programs for injured species, and the estimated cost of projects  
18 to compensate the public for the interim lost use of the impacted  
19 resources. In addition, the parties discussed information  
20 regarding potential alternative EPA response scenarios to address  
21 the Palos Verdes shelf contaminated sediments, and the current  
22 estimated costs of engaging in response activities on the Palos  
23 Verdes shelf. As a result, the Plaintiffs and the Settling Local  
24 Governmental Entities had a reasonable basis for evaluating their  
25 proportional liability as compared to the generator defendants  
26 for both natural resource damages and response costs.

1  
2 The numerous litigation risks associated with this  
3 lawsuit were exhaustively discussed by the parties. In addition  
4 to again discussing each of the litigation issues raised in  
5 connection with the 1993 Consent Decree (which continue to  
6 pertain with equal force today), see 1993 Recommendation at p. 7,  
7 the parties spent a considerable amount of time discussing the  
8 March 22, 1995 opinion of this Court dismissing the natural  
9 resource damages claim against the DDT Defendants and CBS,  
10 limiting Plaintiffs' damages claim against the DDT Defendants  
11 under that claim to \$50 million, and placing the burden on  
12 Plaintiffs' to prove indivisibility of pre- and post-1980  
13 damages. In connection with the March 22, 1995 decision, the  
14 parties discussed the relative risk to the parties of not  
15 agreeing to amending the 1993 Consent Decree.

16 b. Amendment to the May 19, 1992 Consent Decree  
17 with Potlatch Corporation and Simpson Paper  
18 Company

19 The second of the three proposed Consent Decrees  
20 involves Potlatch corporation and Simpson Paper Company. As  
21 described in the 1992 Recommendation, settlement negotiations  
22 between plaintiffs and Potlatch and Simpson initially took place  
23 over a nine month period between April and December of 1991. The  
24 negotiations between the Plaintiffs and Potlatch and Simpson  
25 produced a consent decree that the Special Master recommended  
26 that the Court approve. See 1992 Recommendation. The Court  
27  
28

1 approved the Consent Decree on May 19, 1992. Montrose I, 793 F.  
2 Supp. 237 (C.D. Cal. 1992).  
3

4 Plaintiffs and Potlatch and Simpson contacted the  
5 Special Master to initiate settlement negotiations, because the  
6 parties believed that further negotiations were necessary to  
7 account for a change in the circumstances of this case.  
8 Subsequent meetings and all substantive negotiations between  
9 Plaintiffs and Potlatch and Simpson were conducted under the  
10 direct and personal supervision of the Special Master. The  
11 negotiations took place over a period of several years, although  
12 there were certain hiatuses in the negotiations. The  
13 negotiations between the Plaintiffs and Potlatch and Simpson  
14 produced the proposed Amendment to the May 19, 1992 Consent  
15 Decree.  
16

17 The changed circumstance that the parties wished to  
18 address was the possibility that EPA would decide to undertake an  
19 investigation of the contaminated sediment on the Palos Verdes  
20 shelf, and the effects of that decision, if any, on the Trustees'  
21 claim for natural resource damages. In early 1996, Potlatch and  
22 Simpson informed plaintiffs that if EPA decided to conduct  
23 response activities to address the Palos Verdes shelf  
24 contaminated sediments, that would constitute a material change  
25 in the representations upon which they had relied in entering  
26 into the 1992 Consent Decree and would result in a material  
27 failure of consideration entitling Potlatch and Simpson to  
28 rescind the Consent Decree.

1  
2 Thus, to address the settling parties' concerns about  
3 their liability for response costs, given that the May 19, 1992  
4 Consent Decree only covered natural resource damages, and the  
5 relationship between the two as a result of EPA's investigation  
6 of the Palos Verdes shelf, the parties discussed the scope of  
7 EPA's covenant-not-to-sue, the terms of the reopener provisions,  
8 the definitions of the various terms used in the proposed Amended  
9 Consent Decree, the language of EPA's covenant-not-to-sue, and  
10 the language of EPA's reservation of rights.

11 The parties also discussed the Trustees' decision not  
12 to proceed with the physical restoration component of the  
13 contemplated natural resource damage restoration activities and  
14 to instead address contamination on the Palos Verdes shelf  
15 through EPA-initiated response activities. In particular, the  
16 parties discussed whether this change in responsibility gives  
17 rise to a claim for rescission of the contractual agreement  
18 embodied in the 1992 Decree and entitled Potlatch and Simpson to  
19 a refund of monies already paid to the Trustees. The parties  
20 also reviewed the litigation risks associated with such a claim.

21 The parties also discussed information regarding the  
22 Trustees' current bottom-line estimate of the total natural  
23 resource damages, and estimated costs of EPA's engaging in  
24 response activities on the Palos Verdes shelf. As a result, the  
25 Plaintiffs and Potlatch and Simpson had a reasonable basis for  
26 evaluating the proportional liability as compared to the other  
27  
28

1 generator defendants for both natural resource damages and  
2 response costs.

3  
4 The negotiations required numerous conference calls and  
5 meetings. Issues were vigorously contested and were only  
6 ultimately resolved though a series of compromises on both sides.  
7 Numerous drafts of the settlement agreement were prepared and  
8 exchanged by the parties. A number of the contested provisions,  
9 including the introductory language and the scope of the covenant  
10 not to sue to be included in the Consent Decree, were only  
11 resolved as a result of compromise language which emerged through  
12 joint discussions under the Special Master's supervision. The  
13 parties discussed litigation risks associated with the settlers'  
14 claim for rescission.

15 c. Consent Decree with CBS Corporation

16 The final proposed Consent Decree involves CBS. In the  
17 Spring of 1998, Plaintiffs and CBS contacted the Special Master  
18 to initiate settlement negotiations. Subsequent meetings and all  
19 substantive negotiations between Plaintiffs and Potlatch and  
20 Simpson were conducted under the direct and personal supervision  
21 of the Special Master. The negotiations between the Plaintiffs  
22 and CBS produced the proposed Consent Decree with CBS  
23 Corporation.

24 The negotiations required numerous conference calls and  
25 at least one in person meeting with the Special Master, issues  
26 were vigorously contested and were only ultimately resolved  
27 through a series of compromises on both sides. Numerous drafts



1 of the settlement agreement were prepared and exchanged by the  
2 parties throughout May through July of 1998. A number of the  
3 contested provisions, including the waiver of defenses, and the  
4 scope of the covenant not to sue to be included in the Consent  
5 Decree, were only resolved as a result of compromise language  
6 which emerged through joint discussions under the Special  
7 Master's supervision. Administrative terms such as the document  
8 retention provision and the establishment of the escrow accounts  
9 were also negotiated. The parties discussed litigation risks  
10 associated with determining the volume of PCBs discharged by CBS,  
11 including discussion of the pathway for PCBs to reach the Palos  
12 Verdes shelf from the Westinghouse plant was through the Joint  
13 Outfall System.  
14

15 d. Special Master's Report on Procedural  
16 Fairness

17 The Special Master is able to verify that Plaintiffs  
18 have been consistent in their representations to the different  
19 groups and has been able to assure that each group has been  
20 treated equitably relative to the others. Based on the  
21 foregoing, the Special Master finds that the settlement  
22 negotiations resulting in all three Consent Decrees were  
23 conducted in a procedurally fair manner.  
24

25 2. Substantive Fairness

26 The standard applied by the Ninth Circuit in assessing  
27 substantive fairness of the terms of a proposed consent decree  
28

1 has not changed since the 1993 Recommendation of the Special  
2 Master. As stated in the 1993 Recommendation, the issue of  
3 "[s]ubstantive fairness requires that the court inquire into  
4 whether there has been an attempt to apply comparative fault  
5 concepts in arriving at the settlement." See 1993 Recommendation  
6 at p. 7. "Substantive fairness introduces into the equation  
7 concepts of corrective justice and accountability: a party  
8 should bear the cost of the harm for which it is legally  
9 responsible." Cannons, 899 F.2d at 87. Liability should be  
10 apportioned among settling PRPs "according to rational (if  
11 necessarily imprecise) estimates of how much harm each PRP has  
12 done." Id.

13  
14 In its March 21, 1995 decision, the Ninth Circuit never  
15 reached the issue of whether the 1993 Consent Decree was  
16 "substantively fair." The Ninth Circuit held that this Special  
17 Master had not provided the Court with sufficient information to  
18 enable the Court to adequately determine whether the 1993 Consent  
19 Decree was fair. Montrose, 50 F.3d at 748. This Special Master  
20 withheld that particular information from the Court as he was in  
21 active negotiations with the other groups of defendants at the  
22 time of the 1993 Recommendation.

23 As discussed above, the Ninth Circuit stated that  
24 since, on the record provided by the Special Master, it was not  
25 possible for this Court to determine the proportional  
26 relationship between the Plaintiffs' then current estimate of  
27 total natural resource damages and the amount the Settling Local

1 Governmental Entities agreed to pay, this Court could not  
2 evaluate the fairness of that proportional relationship in light  
3 of the degree of liability attributable to the Settling Local  
4 Governmental Entities. Id. at 747. The Ninth Circuit concluded:

5 Here, with no evidence of the governments' estimate --  
6 preliminary or otherwise -- of total natural resource  
7 damages, the court determined that \$45.7 million  
8 represented a "fair and reasonable" settlement.

9 However, "fair" and "reasonable" are, by their very  
10 nature, comparative terms. In such an informational  
11 vacuum, the fairness or reasonableness of a \$45.7  
12 million settlement simply cannot be measured.

13 Id.<sup>9/</sup>

14 a. The Record Before the Court

15 The Ninth Circuit vacated this Court's approval of the  
16 1993 Consent Decree with the Settling Local Governmental Entities  
17 because the parties had not provided the Court with the  
18 information it needed to determine the substantive fairness of  
19 that settlement. The Plaintiffs and settling parties have heeded  
20 the admonition of the Ninth Circuit, and under the Special  
21 Master's direction, now have placed before the Court an extensive  
22

23  
24 6. Even though the Ninth Circuit rejected the 1993  
25 Consent Decree for lack of an adequate record, both the Special  
26 Master in recommending approval of the 1993 Consent Decree and  
27 the Court in ultimately approving the 1993 Consent Decree did in  
28 fact consider the very factors the Ninth Circuit recites as  
pertinent to review of a settlement for "substantive fairness."

1 record which is more than sufficient to support approval of the  
2 consent decrees.

3  
4 Included in that record are the consent decrees  
5 themselves. Each decree contains an "Introduction" which  
6 explains in detail the basis for the settlement. In addition,  
7 pursuant to the Special Master's Order of May 28, 1997,  
8 Plaintiffs prepared an extensive set of interrogatory responses  
9 which addressed the basis for the settlement with the Settling  
10 Local Governmental Entities. Those interrogatory responses  
11 discussed in detail the Plaintiffs' estimate of natural resource  
12 damages and also provided an estimate for settlement purposes of  
13 EPA's costs of responding to the contamination on the Palos  
14 Verdes shelf. Following this Court's order of October 6, 1997,  
15 the Defendants were permitted to conduct Federal Rule of Civil  
16 Procedure 30(b)(6) depositions of Plaintiffs on certain specific  
17 categories pertaining to Plaintiffs' settlement framework. The  
18 Defendants took eight days of deposition testimony in late 1997  
19 and early 1998. Pursuant to the October 6, 1997 order, the  
20 Special Master attended and supervised all of these depositions,  
21 and Plaintiffs have submitted to the Court the complete  
22 transcripts and exhibits from those depositions. Finally,  
23 following the publication in the Federal Register of notice of  
24 these settlements, the Plaintiffs received comments on the  
25 settlements from the DDT Defendants, several of the Settling  
26 Local Governmental Entities, and CBS. Attached to Plaintiffs'  
27 memorandum in support of entry of these consent decrees is a  
28

1 lengthy response to the comments of the DDT defendants, including  
2 supporting exhibits.<sup>7</sup>  
3

4 The above-described materials are all before the Court  
5 and provide an extensive record in support of the settlements.  
6 Most importantly, those materials contain the information  
7 concerning plaintiffs' estimates of damages and response costs,  
8 and those estimates permit the Court to find that these consent  
9 decrees are fair and equitable.

10 b. The Settlement Framework

11 The settlement framework set forth in the three Consent  
12 Decrees is essentially the same framework used in connection with  
13 both the Potlatch/Simpson Consent Decree and the 1993 Consent  
14 Decree adjusted to account for developments in the case. The  
15 Consent Decrees include discussions of the methodology used by  
16 Plaintiffs in determining the proportionate liability of the  
17 settling parties; the Trustees' and EPA's combined current  
18 estimate for settlement purposes of the natural resource damages  
19 and response costs arising out of the Palos Verdes shelf  
20 contaminated sediments (\$225 to \$250 million); the nature of the  
21 Settling Local Governmental Entities' liability versus that of  
22 the three groups of generator defendants; the rough proportions  
23 attributable to the generator defendants; and litigation  
24 considerations and risks. See Amended Consent Decree at pp. 12-

25  
26  
27 7. CBS and LACSD, have also submitted extensive exhibits  
28 in support of their motions for entry of their consent decrees.

1  
2 17; Amendment to May 19, 1992 Consent Decree at 1-13; Consent  
3 Decree with CBS at 1-12.

4 Plaintiffs considered the respective contributions of  
5 DDT or PCBs to the Palos Verdes shelf by each group of generator  
6 defendants. Significantly, Plaintiffs applied the same  
7 methodology previously detailed to the Court in connection with  
8 its approval of the Potlatch/Simpson Consent Decree. Montrose I,  
9 793 F. Supp. at pp. 240-241. The Court stated: "The settlement  
10 figure appears to be reasonable and fair. Significantly, the  
11 figure was not arrived at in an arbitrary manner. The Plaintiffs  
12 have explained in detail the methodology that they have used in  
13 arriving at this figure." Id. The methodology used by  
14 Plaintiffs' continues to be reasonable, and the Special Master  
15 will not interfere with the Plaintiffs' determination.

16 The parties also appropriately considered recent  
17 developments in the case. The proposed Consent Decrees  
18 explicitly recognize that EPA's decision to undertake response  
19 activity on the Palos Verdes shelf did play a significant role in  
20 Plaintiffs' estimate of the possible damages and costs they were  
21 willing to accept in early settlement of this case.<sup>8/</sup> The  
22 Consent Decrees make clear that EPA, not the Trustees, has  
23 assumed responsibility for addressing the contaminated offshore  
24 sediments. The Consent Decrees also make clear that because EPA

25  
26 8. Even though this case will soon be approaching its  
27 ninth anniversary (including the two year hiatus in the Ninth  
28 Circuit on the natural resource damages claim), it is still at a  
relatively early stage. For example, discovery is still ongoing  
and not expected to conclude for several years.

1  
2 has greater flexibility in implementing and monitoring response  
3 activities, the estimated costs EPA will incur in connection with  
4 implementation of a response action for the contaminated  
5 sediments is estimated to be much lower than the Trustees'  
6 estimate for addressing the sediments. These assumptions appear  
7 to be reasonable.

8 Moreover, the parties to the Consent Decrees also  
9 reasonably assumed that EPA's decision to take responsibility for  
10 the contaminated sediments will reduce the amount of the  
11 Trustees' claim. Because EPA, unlike the Trustees, will not have  
12 to wait until the culmination of the litigation to begin to  
13 address the contaminated sediments on the Palos Verdes shelf, the  
14 recovery period for the allegedly injured species for which the  
15 Trustees' seek damages will be accelerated. Accordingly, the  
16 amount of the Trustees claim for natural resource damages is  
17 lowered to properly reflect the accelerated pace for addressing  
18 the contaminated sediments.

19 Based on the foregoing considerations, Plaintiffs  
20 developed a bottom-line estimate for settlement purposes of the  
21 costs EPA will incur in addressing the contaminated sediments on  
22 the Palos Verdes shelf, and the damages that the Trustees will  
23 need to recover to directly restore the alleged injured species  
24 and compensate the public for the alleged "lost use" of those  
25 species. Those estimates were provided to the defendants through  
26 interrogatory responses and depositions.

1  
2 The Special Master recognizes that the bottom-line  
3 estimate for settlement purposes is approximately one-half of the  
4 estimate of damages and costs that plaintiffs would seek if this  
5 case proceeds to trial. Nonetheless, use of this amount is  
6 substantively fair given that it protects the public interest in  
7 ensuring that an amount sufficient to affect cleanup and  
8 restoration is secured and given the fact that plaintiffs have  
9 been and continue to be willing to use this figure as a basis for  
10 settlement with the non-settlers.

11 The specific decrees are discussed below.

12 c. Amended Consent Decree with the Settling  
13 Local Governmental Entities

14 The proposed Amended Consent Decree explicitly  
15 identifies the factors Plaintiffs considered in comparing the  
16 "proportion of total projected costs to be paid by the [Settling  
17 Local Governmental Entities] with the proportion of liability  
18 attributable to them." Id. at 747, quoting United States v.  
19 Charles George Trucking, Inc., 34 F.2d 1081, (1st Cir. 1984); See  
20 Amended Consent Decree at pp. 12-16. In so doing, Plaintiffs  
21 first considered the "nature" of liability of the various groups  
22 of defendants. Of particular significance, in this regard was  
23 the fact that, in general, the Settling Local Governmental  
24 Entities were passive conduits of wastewater and storm water and  
25 that any DDT or PCBs that flowed through the collection systems  
26 owned and operated by the Settling Local Governmental Entities to  
27 the Palos Verdes shelf are far less significant to Plaintiffs'



1  
2 assessment of relative contribution to Plaintiffs' claims. See  
3 Amended Consent Decree at p. 12-13.

4       The parties to the proposed Amended Consent Decree  
5 spent substantial time discussing the appropriate settlement  
6 amount in light of the earlier 1993 Consent Decree, the Ninth  
7 Circuit's decision to vacate that decree, the alleged activities  
8 of LACSD and other settlers that gave rise to the claims of  
9 liability against LACSD by Plaintiffs and the claims against the  
10 other settlers by the Third-Party Plaintiffs. The parties to  
11 this settlement also discussed the nature of those activities,  
12 including the extent to which the Settling Local Governmental  
13 Entities are public agencies with limited financial resources,  
14 the extent to which liability arises out of their provision of  
15 public services on a not-for-profit basis, and the fact that they  
16 were largely if not completely unaware of the generator  
17 defendants' discharges of contaminants at issue in the  
18 litigation. The parties also discussed the fact that because  
19 EPA, rather than the trustees, would be cleaning up the sediments  
20 on the Palos Verdes shelf, the total costs were likely to be less  
21 than anticipated during the negotiations of the 1993 Consent  
22 Decree, such that the Settling Local Governmental Entities could  
23 have sought to pay less to settle in the instant proposed Consent  
24 Decree. The Amended Consent Decree also recites as a factor that  
25 once LACSD became aware of the discharges of DDT and PCBs it  
26 undertook actions to halt the discharges, and that LACSD's  
27 efforts resulted in a significant decline in the amounts of those

1  
2 contaminants in the discharge from the outfalls involved herein.  
3 Id.

4 In light of the foregoing, the parties agreed that  
5 \$42.2 million continued to represent an appropriate amount for  
6 settlement of the natural resource damage claims. The amount  
7 ultimately agreed upon reflects consideration of all of these  
8 factors.

9 Also, included in this settlement is the \$3.5 million  
10 for response costs for removing DDT-contaminated sediments from  
11 the storm water pathway and the sewers. These areas are the only  
12 areas where it could be argued that the Settling Local  
13 Governmental Entities have liability with respect to the second  
14 claim for relief.<sup>9/</sup>

15 These amounts appear consistent with the settlers'  
16 apparent degree of involvement with the alleged releases of  
17 hazardous substances and with the Palos Verdes shelf.

18 9. The findings made by the Special Master in the 1993  
19 Recommendation regarding the Settling Local Governmental  
20 Entities' liability for the soil, groundwater, sewers, and storm  
water channels continue to pertain today:

21 With respect to settlement of the Second Claim for  
22 Relief, which was brought only by the United States, it  
23 was noted that while the United States did not name any  
24 of these settlers as defendants on that Second Claim,  
25 the third-party claims appeared to include contribution  
26 claims against the governmental agencies for response  
27 costs at the Montrose NPL Site. The issue of whether  
there should be a release from such liability was  
discussed, along with the degree to which any of these  
governmental agencies would potentially be liable, if  
at all, given the location of their discharges and the  
location of the contamination of the Montrose NPL Site.

1993 Recommendation at pp. 8-9.

1  
2 d. Amendment to the May 19, 1992 Consent Decree  
3 with Potlatch Corporation and Simpson Paper  
4 Company

5 This Court has already held that a \$12 million  
6 settlement for Potlatch and Simpson is substantively fair.  
7 Montrose I, 793 F. Supp. at 241. The parties to the proposed  
8 amendment discussed whether a further payment would be necessary  
9 to fairly resolve the potential liability of Potlatch and Simpson  
10 after EPA's decision to undertake response activity on the Palos  
11 Verdes shelf, given that the volumetric contribution of the  
12 settling parties remained as described to the Court in the 1992  
13 Consent Decree. The parties also discussed Potlatch's and  
14 Simpson's claim for rescission of the 1992 Consent Decree. The  
15 parties concluded that the \$12 million agreed to in the 1992  
16 Consent Decree had been expected to fund all actions necessary to  
17 eliminate threats to the environment that could give rise to the  
18 need or involvement by EPA in the future. Therefore, the parties  
19 concluded that \$12 million remained the appropriate amount to  
20 fund all such actions, whether taken by EPA or the Trustees. The  
21 negotiated amount appears to fairly account for the changed  
22 circumstances of the case.

23 The negotiated amount also appears consistent with the  
24 settlers' apparent degree of involvement with the alleged  
25 releases of hazardous substances to the Palos Verdes shelf.

26 e. Consent Decree with CBS Corporation

27 The Plaintiffs and CBS had negotiated several times,  
28

1 (e.g., in 1993 and 1997) but never reached a resolution. In the  
2 Spring of 1998, the parties contacted the Special Master to  
3 oversee the negotiation of a consent decree. The parties to the  
4 proposed settlement spent considerable time discussing the  
5 appropriate settlement amount in light of available information  
6 concerning the discharge volumes. The amount ultimately agreed  
7 upon appears consistent with CBS's apparent contribution to the  
8 alleged hazardous substances releases.

9  
10 The parties acknowledge that precise information  
11 regarding the volume of PCBs discharged by CBS is not available.  
12 This Court stated in approving the 1992 and 1993 Consent Decrees  
13 that "it would be contrary to CERCLA's overriding goal of  
14 achieving prompt settlement to require, prior to approval of the  
15 proposed settlements, precise information about the relative  
16 culpability of different defendants." Montrose I, 793 F. Supp.  
17 at 240; Montrose II 827 F. Supp. at 1458. In light of that  
18 statement, the amount agreed upon by the parties represents an  
19 acceptable estimate of the relative share appropriate for CBS.

20 f. Special Master's Report on Substantive  
21 Fairness

22 The Special Master has carefully reviewed the  
23 provisions of the three Consent Decrees. The Special Master has  
24 been privy to the negotiations of the parties and is familiar  
25 with facts that serve as a predicate for negotiations of the  
26 specific amounts the settling parties have agreed to pay. The  
27 Special Master is also familiar with the facts and assumptions

1  
2 Plaintiffs have made in devising a settlement framework and  
3 estimated bottom-line settlement amount. These amounts appear to  
4 be consistent with the settlers' apparent degree of involvement  
5 with the alleged releases of hazardous substances both with  
6 respect to the Palos Verdes shelf and the other areas where it  
7 could be argued that the Settling Local Governmental Entities  
8 have liability under the second claim for relief.

9 The negotiated amounts and the other provisions of the  
10 settlements are consistent throughout all three consent decrees  
11 and are consistent with the positions taken by the Plaintiffs in  
12 settlement discussions with the DDT Defendants.

13 Accordingly, the Special Master finds the three Consent  
14 Decrees to be substantively fair.

15  
16 B. Reasonableness

17 The Amended Consent Decree appears to be a reasonable  
18 compromise in view of the nature of the Settling Local  
19 Governmental Entities activities giving rise to liability, the  
20 Settling Local Governmental Entities relationship to the damages  
21 and response costs alleged, the estimated costs of restoration  
22 and response costs, the significant litigation risks confronting  
23 both Plaintiffs and the Settling Local Governmental Entities, and  
24 the benefits of the parties in continuing to attempt to achieve a  
25 relatively early resolution of this matter without further  
26 litigation. See Cannons Engineering, 899 F.2d at 89-90.

1                   The Amendment to the May 19, 1992 Consent Decree  
2  
3 appears to be a reasonable compromise in view of the volumes of  
4 PCBs alleged to have been discharged by those parties, the  
5 estimated costs of restoration and response costs, the  
6 significant litigation risks confronting both Plaintiffs and  
7 Potlatch and Simpson, and the benefits of the parties in  
8 continuing to attempt to achieve a relatively early resolution of  
9 this matter without further litigation, and the changed  
10 circumstances since the entry of the 1992 Consent Decree.

11                  The Consent Decree with CBS appears to be a reasonable  
12 compromise in view of the volumes of PCBs alleged to have been  
13 discharged by CBS, the uncertainty in the calculation of those  
14 volumes, the estimated costs of restoration and response costs,  
15 the significant litigation risks confronting both Plaintiffs and  
16 CBS, and the benefits of the parties in continuing to attempt to  
17 achieve a relatively early resolution of this matter without  
18 further litigation.

19                  The settlement framework and the settlement amount  
20 appropriately take into account the relative strength of the  
21 parties litigation positions and the fact that absent the instant  
22 settlement Plaintiffs might have to wait years to obtain funds to  
23 implement response or restoration activity. Id. at p. 90. The  
24 figures used in estimating the bottom-line settlement amount  
25 appear to be a reasonable estimate of the amount necessary to  
26 address the contaminated sediments and directly restore the  
27 alleged injured species. This determination necessarily

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1  
2 recognizes that the Special Master is not to subject the  
3 settlement to a "standard of mathematical precision," Cannons  
4 Engineering, 899 F.2d at 90, or "line-item scrutiny." Montrose  
5 I, 793 F. Supp. at p. 241.

6 The reopener provisions for the Trustees for natural  
7 resource damages and for EPA for response costs are identical in  
8 all significant regards in all three proposed decrees and  
9 identical in all significant regards to those approved in the  
10 1993 Consent Decree. The principle difference between the  
11 reopener provisions in the 1993 Consent Decree and the Amended  
12 Consent Decree is that the "reservation of rights" regarding the  
13 potential for EPA response activity with respect to the Palos  
14 Verdes shelf (regardless of whether that area was part of the  
15 Montrose NPL Site) has been deleted because that condition has  
16 now come to pass as a result of EPA's July 10, 1996 decisions to  
17 undertake response activity there. The reopener provisions also  
18 have been modified to account for the settlement by the  
19 California Department of Toxic and Substances Control of its  
20 claim for costs with respect to the Montrose NPL Site.

21 All three Consent Decrees retain "the narrow limitation  
22 for potential future liability associated with releases, injury  
23 and damage that can be shown to be the result of implementation  
24 of a higher level of wastewater treatment by LACSD . . . ." That  
25 provision continues to be a reasonable compromise consistent with  
26 CERCLA. See Montrose II, 827 F. Supp. at 1458.

1  
2 C. Consistency with Statutory Purpose

3 Approval of the Consent Decrees will result in the  
4 release of \$67.2 million to the Plaintiffs. Under the terms of  
5 the Consent Decrees, the monies released to EPA will be placed  
6 into accounts established exclusively for the use by EPA in  
7 connection with the Palos Verdes shelf and other areas of  
8 contamination associated with the Montrose plant and property.  
9 The monies released to the Trustees will be disbursed to an  
10 account in the court registry investment system for damage  
11 assessment and restoration-related activities. Thus, the monies  
12 to be disbursed under the Amended Consent Decree are to be used  
13 by Plaintiffs in a manner consistent with the purposes of CERCLA.  
14 Moreover, as noted above, the relative early settlement of this  
15 matter will permit the Plaintiffs to proceed without waiting for  
16 a judgment in the litigation.

17  
18 RECOMMENDATION OF THE SPECIAL MASTER

19 For all of the foregoing reasons, the Special Master  
20 hereby recommends that the Court grant the motion for entry and  
21 that the Court order the entry of the three proposed consent  
22 decrees and cause the proposed Amended Consent Decree With the  
23 Settling Local Governmental Entities, the Amendment to the May  
24 19, 1992 Consent Decree with Potlatch Corporation and Simpson  
25 Paper Company, and the Consent Decree with CBS Corporation to be  
26 entered herein.

27 IT IS SO RECOMMENDED TO THE COURT.  
28



08-18-1999 01:03PM

HONORABLE HARRY V PEETRIS

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1 The Law Clerk shall serve a copy of this Report and  
2 Recommendation via regular mail upon the Liaison Committee. In  
3 addition, the Law Clerk shall serve via facsimile today a copy of  
4 this Report and Recommendation upon Messrs. Saurenman and  
5 Simshauser. Mr. Saurenman shall serve via facsimile today a copy  
6 of this Report and Recommendation upon Messrs. O'Rourke,  
7 Beverlin, Gershon, McClintock, Tatro and Cohler. Mr. Simshauser  
8 shall serve via facsimile today a copy of this Report and  
9 Recommendation upon Messrs. Lytz and Galvani and Ms. McCormick.

10 IT IS SO ORDERED.

11  
12 Dated: August 18, 1999

13 Respectfully Submitted,

14  
15 

16 The Honorable Harry V. Peetris  
17 Special Master  
18  
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20  
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28

THE HONORABLE  
**HARRY V. PEETRIS**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA;  
STATE OF CALIFORNIA, ex rel.,  
DEPARTMENT OF FISH AND GAME,  
STATE LANDS COMMISSION, and  
DEPARTMENT OF PARKS AND RECREATION,

Plaintiffs,

v.

MONTROSE CHEMICAL CORPORATION OF  
CALIFORNIA; RHONE-POULENC  
BASIC CHEMICALS COMPANY;  
ATKEMIX THIRTY-SEVEN, INC.;  
STAUFFER MANAGEMENT COMPANY;  
ICI AMERICAN HOLDINGS, INC.;  
CHRIS-CRAFT INDUSTRIES, INC.;  
WESTINGHOUSE ELECTRIC CORPORATION;  
POTLATCH CORPORATION;  
SIMPSON PAPER COMPANY; and  
COUNTY SANITATION DISTRICT NO. 2  
OF LOS ANGELES,

Defendants.

AND RELATED THIRD PARTY ACTIONS.

CASE NO. CV 90-3122 AAH

PROOF OF SERVICE

I, the undersigned, certify and declare that I am over

1 the age of 18 years, employed in the County of Los Angeles, State  
2 of California, and not a party to the above-entitled cause. On

3 August 18, 1999, I served a true copy of the following document:

4 Report and Recommendation of the Special Master Re: Motion  
5 for Entry of the (1) Amended Consent Decree with the  
6 Settling Local Governmental Entities; (2) Amendment to the  
May 19, 1992 Consent Decree with Potlatch Corporation and  
Simpson Paper Company; and (3) Consent Decree with CBS  
Corporation

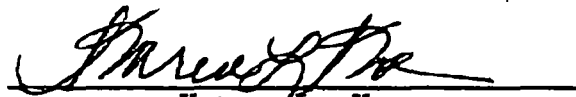
7 by depositing them in the United States Mail in a sealed envelope  
8 with the postage thereon fully prepaid to the persons listed on  
9 the attached service list.

10 Place of mailing: Los Angeles, California.

11 Executed on August 18, 1999 at Los Angeles, California.

12 I hereby certify that I am a member of the Bar of the  
13 United States District Court, Central District of California.

14 I hereby certify under the penalty of perjury that the  
15 foregoing is true and correct.

16  
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27  
28  
  
Karen L. Koe

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